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No. 76-1405

In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIAM RICHARD GALLAGHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the district court should have granted his motion to suppress evidence seized under a daytime search warrant which was not executed until petitioner had returned to his residence at night.

Following the denial of his pre-trial motion to suppress, petitioner pleaded guilty in the United States District Court for the Eastern District of New York to possessing goods stolen from interstate commerce, in violation of 18 U.S.C. 659.[1] Petitioner was sentenced to imprisonment for two years, of which 18 months was supended, and

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[1]Petitioner pleaded guilty after the government consented to petitioner's appeal of the denial of his motion to suppress.

a $1,000 fine. The court of appeals affirmed without opinion (Pet. App. A).

1. At 3:00 a.m. on January 28, 1976, Kenneth Stallone was arrested by agents of the Federal Bureau of Investigation (FBI) as he was about to deliver a box of stolen clothing to petitioner's residence in Brooklyn, New York (G.A. 1a).[2] At that time the FBI agents initiated a continuing surveillance of petitioner's house (G.A. 2a).

At 6:30 a.m. petitioner departed from the house; he spoke with an FBI agent but refused to consent to a search of the residence (G.A. 2a). One hour later petitioner's wife, accompanied by several children, also departed (G.A. 2a-3a). At approximately 1:30 p.m. an FBI agent obtained a warrant authorizing the search of petitioner's residence for stolen goods (G.A. 3a). The warrant directed that it be executed during the daytime, between the hours of 6:00 a.m. and 10:00 p.m. Upon the issuance of the warrant, FBI agents proceeded to the house and attempted to execute the warrant, but no one responded to the knock on the door (G.A. 3a). No one returned to the house until 11:15 p.m., when the agents observed petitioner arrive. Fifteen minutes later, at 11:30 p.m., the agents again knocked on the door and were admitted by petitioner (G.A. 4a). In the subsequent search a large quantity of stolen goods were discovered and seized (G.A. 4a).

2. Petitioner contends that this evidence should have been suppressed because, while the search warrant directed, in accordance with Fed. R. Crim. P. 41(c), that

[2]"G.A." refers to the appendix to the government's brief in the court of appeals.

it be executed by 10:00 p.m.,[3] the search did not in fact occur until 11:30 p.m.

The district court properly held, however, that the failure of the agents to execute the warrant before 10:00 p.m. does not require suppression in the circumstances of this case (Pet. App. D). After the warrant was obtained in the early afternoon, the agents attempted to execute the warrant but found that no one was present at petitioner's residence. Instead of forcibly breaking into the residence the agents reasonably waited for an occupant to return home, so that the warrant could be served and peaceably executed. Shortly after petitioner's return, they knocked on petitioner's door and were admitted for the purpose of executing the warrant.[4]

Because the warrant was served immediately after petitioner's return there was no risk that sleeping householders would be awakened, or any need for forcible

[3]Rule 41(c), Fed. R. Crim. P., provides in pertinent part:

> * * * The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime.* * *

"[D]aytime" is defined in Rule 41(h), Fed. R. Crim. P., as "the hours from 6:00 a.m. to 10:00 p.m. according to local time."

[4]While the agents could have broken into the unoccupied home to execute the warrant without violating the Fourth Amendment (*Payne* v. *United States*, 508 F. 2d 1391 (C.A. 5), certiorari denied, 423 U.S. 933; *United States* v. *Gervato*, 474 F. 2d 40 (C.A. 3), certiorari denied, 414 U.S. 864)), the less intrusive nature of serving the warrant at the time of the occupant's return during the evening has been recognized. *United States* v. *Gervato*, 340 F. Supp. 454, 463 (E.D. Pa.), vacated on other grounds, 474 F. 2d 40 (C.A. 3).

entry.[5] Thus, the reason for requiring specific authorization of night searches under Rule 41—the serious intrusion on privacy that results from disturbing residents after they have retired—is inapplicable here. See *United States* v. *Ravich*, 421 F. 2d 1196, 1201-1202 (C.A. 2), certiorari denied, 400 U.S. 834. The agents' good faith decision to await petitioner's return and to execute the warrant in his presence gave full protection to his Fourth Amendment rights. In such circumstances, the purpose of the exclusionary rule—to deter unreasonable police conduct—would not have been served by suppression of the evidence seized. See *United States* v. *Burke*, 517 F. 2d 377 (C.A. 2); cf. *Michigan* v. *Tucker*, 417 U.S. 433, 447.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1977.

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[5] As the district court found (Pet. App. D):

> * * * It was stipulated [petitioner] was the sole occupant at the time. We cannot regard this intrusion made within five to fifteen minutes after he entered the house as an abrasive invasion of people asleep in bed in the middle of the night.
>
> So I can't find, as I say, that this would not have been as abrasive search. I cannot find that it would have been an abrasive search under the circumstances or what I will regard as a repulsive intrusion of privacy in the middle of the night.